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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 531

JOHN DEMARTINI CO., INC. (a corporation), EDWARD L. KAHN, doing business under the name and style of Edw. L. Kahn & Co., and P. LERNER COMPANY, LTD. (a corporation),

Petitioners,

vs.

THE AMERICAN STEAMER MAUI, her engines, boilers, tackle, apparel, and furniture, and MATSON NAVIGATION COMPANY (a corporation),

Respondents.

Brief of Respondents in Opposition to Petition for Writ of Certiorari

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STATEMENT OF FACTS

The case presented by the petition bears but little resemblance to that argued in the Circuit Court of Appeals and still less to the case tried in the District Court.

This case was purely one of fact. On all the facts the District Court made full findings, and in all of them the Circuit Court of Appeals concurred, thus bringing the case within the "two court" rule.* Compactly stated, the facts are these:

In the late summer and early fall of 1936 collective bargaining agreements between Pacific Coast shipowners and the various maritime and longshore unions were due to expire. Prolonged negotiations for new contracts ensued for a period of over three months. The unions threatened strike and set various deadlines which were postponed from time to time as negotiations continued. Meanwhile, numerous "quickie" strikes and work stoppages occurred, affecting this or that ship in unpredictable fashion. Finally, the date of October 28, 1936, was set as the strike deadline by the unions (R. 483, 484, 439, 134-153).

All this was of wide public notoriety and well known to petitioners (R. 484, 439, 141, 159, 160, 163-172). In this known state of affairs the steamship "Maui" was scheduled to sail from San Francisco to Hawaii, originally on October 28th, but to get to sea, if possible, ahead of the proposed strike, if one should come, the schedule was moved forward to October 27th. This fact was also known to the petitioners (R. 83-86, 105-106, 121-123).

Possessing all this knowledge before acting, the petitioners committed their goods to the "Maui" on October 26 and 27 under bills of lading expressly exempting the carrier from liability for losses arising from detention, strikes, stoppages or shortage or restraint of labor, and

*Cf. *The Iroquois*, 194 U. S. 235, 247.

labor troubles, whether of carrier's employees or of others, partial or general (R. 436-439, 483).

At the time of loading petitioners' goods, the vessel had a full crew (R. 484, 432). Before the voyage could commence, it was necessary for the ship to load a cargo of explosives, and for this purpose it was necessary to make a port movement to the explosives anchorage in San Francisco Bay, a few hundred yards from the dock (R. 430, 482). Shortly before the vessel cast off lines to go to the explosives anchorage on October 27, the unlicensed deck crew of twelve men quit the ship (R. 432, 484). The vessel still had a full crew of licensed officers, a full engine crew and a full steward's department. To enable the ship to carry out the port movement from dock to explosives anchorage, the work of the unlicensed deck crew was performed by such of the licensed officers as were not on watch (thus performing duties beyond those of their offices) and by three extra relief officers from shore (R. 258, 344). Since the unlicensed crew must by law be divided into three watches of equal size, only one of which would be on duty at any time, the work of the unlicensed deck department was actually being performed by as many men as would in any event have been used.

After the lines were cast off, when the ship was already underway and after the tide had caught it, the unlicensed engine crew unexpectedly deserted the ship and swarmed ashore. This, too, was a "quickie" strike. It was then too late to stop the vessel. All that could be done was to permit it to go to anchorage in the bay (R. 433, 484, 245). This was done. The petition fails to note that the loss of the engine crew occurred after it was too

late to stop the vessel. The next day the steward's department quit the ship. Meanwhile, longshoremen hurled threats at the officers if they persisted in doing sailors' work.

By virtue of the "quickie" strikes the vessel lay anchored in the bay. Because of lack of a crew, it was physically impossible to return to the dock (R. 433, 485).

At midnight, October 29, 1936, a general coastwide maritime strike of all labor broke out and lasted until February 5, 1937 (R. 433, 434, 484).

As a consequence of the "quickie" strikes and labor stoppages of October 27 to 29 and the general strike of October 29 to February 5, the vessel could do naught but lie at anchor in the bay; the petitioners' perishables rotted away before the vessel could return to the dock on February 5.

Petitioners comment (petition, p. 4) that the Circuit Court of Appeals by referring to the general strike as the background of the litigation apparently believed that strike conditions lessen a carrier's legal obligation. This suggestion of the petitioners is utterly false and is an unjustified attempt to inject into this simple case of negligence or no negligence supposedly exciting complications.

No such significance can be attached to the decision of the court below. The strike clause was relied on merely to relieve the carrier from what might otherwise be an insurer's liability. It was recognized that if the carrier were negligent in the premises and if negligence proximately caused the loss, it would be liable. The question in the case was therefore merely whether there was any such negligence (R. 487).

Both the District Court and the Circuit Court of Appeals found the following to be the facts, among others:

The voyage never commenced (R. 430, 488).

The respondent not only was not negligent in any respect, but in fact exercised the greatest care, diligence, prudence and wisdom in the circumstances (R. 431, 432, 433, 434, 435, 440, 444, 445, 485, 488).

The loss was entirely due to deterioration resulting from delay; the respondent exercised all care to preserve the cargo on board during the delay; and the *sole* cause of the delay was the strikes and the labor troubles, a cause exempt by the bills of lading (R. 432, 434, 435, 440, 487).

The respondent exercised the highest degree of care and diligence to obtain and maintain a crew, to carry out the contracts of affreightment, and to avoid the consequences of the strikes and labor stoppages (R. 435, 485).

It was impossible to bring the vessel back to the dock; and had it been possible, it would not have been the diligent or reasonable thing to do, it being reasonably anticipated that a crew would be completed and the ship set on its voyage (R. 444, 445, 485, 486).

Permitting the vessel to start to the explosives loading anchorage without its usual number of unlicensed deck crew was not negligent, but, on the contrary, was an act of care and prudence, reasonably adapted and in fact called for by experience of the industry, and justifiably expected, to facilitate completion of the crew and to enable the vessel to start its voyage (R. 444, 485). The universal experience of the whole industry, of the respondent company and of this ship itself demonstrated that as long as shipside was at

> the dock, the crew could never be completed because of steady leaking away, whereas by removing a vessel a short distance from the dock it could soon obtain its full complement and sail (R. 153, 154, 216, 332, 333).*

The loss thus having occurred by reason of causes from liability for which carrier was exempt by the contract of affreightment (R. 440, 487), and the evidence having demonstrated that the carrier was guilty of no negligence, petitioners have tirelessly sought some theory upon which to hold the carrier liable without fault on its part. Many theories were advanced by them in the several courts below, and the petitioners now proffer three of the many (petition, pp. 6 and 7).

But petitioners' first point was not raised in any form until after the trial of the case, and it was not raised in its present form until the case reached the Circuit Court of Appeals. Petitioners' second point was not raised until they filed their Reply Brief in the latter court, and their third point was not raised until they filed in the Circuit Court of Appeals a petition for rehearing.

We now take up each of the three contentions in turn.

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*Petitioners refer invidiously to the practice as a form of "shanghaiing". No "shanghaiing" is involved. There is no element of duress, coercion, force or involuntary detention. The practice merely took account of practical psychology.

DISCUSSION

I. REPLY TO PETITIONERS' POINT A

Summary

Respondent did not lose the protection of the contract exemption by not offering proof on the matter of general seaworthiness of the vessel.

Discussion

When a shipper proves that his goods are damaged, the carrier, if he bases a defense on the contract of affreightment (bill of lading), must establish that the cause of the loss falls within a bill of lading exception. This done, the shipper may still recover if he can prove that the carrier was guilty of negligence proximately causing the loss.

In the instant case, the respondent established, as both the District Court and the Circuit Court of Appeals found, that the loss was due *solely* to the delay which was *solely* caused by the strikes and labor troubles, a cause excepted by the bill of lading. There was no other cause.

As the Circuit Court of Appeals said:

> "The facts clearly establish as the cause of the damage the delay in shipment. And the delay, in turn, was shown to have been the consequence of an excepted cause, not involving negligence on the part of the shipowner." (R. 487)

The evidence did not merely show (as the petition, p. 15, puts it) that the loss was "apparently" due to an excepted cause; it *demonstrated* beyond chance of quibble that the loss was due to an excepted cause. The respondent then did not rest, as it might have done, on the rule that it was the shipper's burden to prove negligence; the

respondent itself affirmatively established, to the satisfaction of both courts below, that there was no negligence. Questions of burden of proof do not therefore arise.

Now, petitioners urge that to avail itself of bill of lading provisions the carrier must go further and affirmatively prove seaworthiness of the ship in every respect. They do not claim that there was any item of unseaworthiness causally related to the loss, nor do they suggest any particular kind of seaworthiness toward which the carrier should have directed proof. They mean that the carrier was bound to prove that it was free from negligence with respect to matters having no causal relation to the damage; that there is an artificial rule requiring the carrier in every suit for cargo damage to offer proof that every nut, screw, rope and plank from the highest mast to the keel was seaworthy.

Common sense and the established law are clearly otherwise, and are this: Where the carrier's defense is based on an exception in the bill of lading, unseaworthiness is absolutely immaterial, unless the proximate cause of the damage is proved to be some specific element of unseaworthiness; in the latter event it becomes material to inquire into the question whether there was due diligence to make seaworthy. *The Malcolm Baxter, Jr.*, 277 U. S. 323, 72 L. Ed. 901, definitively settled the law:

> "Unseaworthiness alone or deviation caused by it displaces the contract of affreightment only in so far as damage is caused by the unseaworthiness."

As stated in an elementary work, 58 *Corpus Juris*, 416:

> "Unseaworthiness of the ship does not preclude exemption from liability for damages resulting from

> a cause wholly distinct from unseaworthiness and excepted by the parties, and it has been held that seaworthiness is not a condition precedent to the operation of the contractual limitations of liability."

No decision can be found supporting petitioners' contention. The petition (p. 16) erroneously states that the Circuit Court of Appeals "concedes that its ruling creates a conflict with other decisions". On the contrary, what the court below said was that it did not agree that the cases cited by the petitioners established the rule for which they contend.

Petitioners' argument is a confusion of unlike things, seeking to project the rules concerning a defense under Section 3 of the *Harter Act* (46 *U. S. Code,* Sec. 192) into the field of bill of lading (contractual) defenses.

Generally speaking, a ship may by contract excuse itself from liability for anything except negligence. But in addition to contractual exemptions, it has certain immunities under statute. Section 3 of the *Harter Act* (46 *U. S. Code,* Sec. 192) exempts the shipowner from certain kinds of negligence of his employees provided he has exercised due diligence to make the ship seaworthy before it commenced the voyage. Where the shipowner seeks *statutory* exoneration as from negligence for which otherwise he would be liable, he must comply with the conditions precedent prescribed by the statute, and since the statute prescribes that he must have exercised due diligence to make the ship seaworthy, he must prove that fact. The reason is purely statutory, as shown by *The Wildcroft,* 201 U. S. 378, 50 L. Ed. 794, and *The Isis: May v. Hamburg-American Line,* 290 U. S. 333, 78 L. Ed. 348.

The necessity of proving seaworthiness or due diligence to make seaworthy exists only when the statute is invoked. But where the shipowner is not seeking statutory exemption and the cause of the loss is not unseaworthiness, inquiry into seaworthiness need not be made.

Here respondent did not invoke the *Harter Act* for immunity, nor did it raise any defense to exempt it from negligence but relied on the contract to exonerate it from an insurer's liability for damage not resulting from negligence.

In the *Horaisan Maru: Yokohama, etc., Bank v. Mitsui & Co., Ltd.*, 73 Fed. (2d) 526, 527, 1935 A. M. C. 96 (C.C.A. 2), the court said (per Learned Hand, J.):

> "* * * she [the ship] need not rely upon Section 3 of the Harter Act (46 U. S. C. A., Sec. 192), and would be liable only in case she was unseaworthy in some way which caused the loss". (p. 527)

Petitioners' chief reliance is *Martin v. The Southwark*, 191 U. S. 1, 48 L. Ed. 65. That case does not support the contention. There a cargo of meat rotted, and the cause was conceded and proved to be unseaworthiness, i.e., failure of the refrigeration apparatus during the voyage. This Court held that the carrier could not claim exemption under Section 3 of the *Harter Act* because it did not comply with the requirements of Section 3 that it prove due diligence to make the ship seaworthy. The carrier then argued that it relied on a contract clause. The contract clause in question is quoted in 191 U. S. at page 2 and provides that the "goods shipped hereunder are absolutely at the risk of the owner in every respect, and that

the carrier is responsible for no loss, delay or damage thereto, however arising". This clause was held absolutely void, because it sought to relieve the ship from liability for damage to refrigerated cargo arising from any and all causes including the ship's own negligence, and because under Section 2 of the *Harter Act* a bill of lading clause is void which seeks to relieve the carrier from its own negligence. To escape liability it was necessary to fall back on Section 3 of the *Harter Act,* the statutory exemption. This the carrier could not do because it had not complied with the condition precedent prescribed by the section (see discussion, 191 U. S. pp. 16-17). In the present case respondent does not invoke Section 3, and the contract does not violate Section 2.

As stated in *The Willdomino,* 300 Fed. 5, 10 (C. C. A. 3) (affirmed 272 U. S. 718), the principles which *The Southwark* is recognized as holding are that under the *second* section of the *Harter Act*

> "liability for loss to cargo caused by unseaworthiness arising from lack of diligence on the part of the owner cannot be contracted away."

and that

> "The burden is on the shipowner setting up exemption from liability under the *third* section of the act to prove that he exercised due diligence to make the vessel in all respects seaworthy * * *."

The petition cites a number of other cases. Some are instances of defenses under Section 3 of the *Harter Act.* Most of the cases cited are still less in point. They are cases where a specific element of unseaworthiness was

proved and established as having directly caused the damage, and the failure to exercise due diligence to provide a seaworthy ship in the respects involved was an act of negligence directly causing the damage. Some of these cases, where a specific element of unseaworthiness was proved to be the proximate cause of the damage, allude to or turn on the matter of burden of proof of due diligence (or lack of due diligence) to make the ship seaworthy in the exact premise. But this question of burden of proof does not arise in the present case, because the facts were fully proved by respondent and affirmatively established, as both courts below found, that the cause was something other than negligence. (Cf. *Horaisan Maru: Yokohama etc. Bank v. Mitsui & Co. Ltd.*, 1935 A. M. C. 96, 73 Fed. (2d) 526 (C. C. A. 2d).)

In an appendix hereto we briefly digest a number of the other cases cited by petitioner showing that they are not in point.

The rule that the statutory immunities of Section 3 of the *Harter Act* cannot be invoked unless the carrier establishes seaworthiness in all respects though causally unrelated to the loss, while accepted as a necessary deduction from the language of Section 3, was generally thought to be unfortunate. Cf. *Robinson (Hornbook) on Admiralty*, Sec. 71, pp. 510-512. Subsequently the *Harter Act* was for the most part replaced by the *Carriage of Goods by Sea Act of 1936* (46 *U. S. Code*, Sec. 1300 et seq.) in accord with the Hague Rules. It is significant that the latter act wholly abandons the rule to which we have just referred (46 *U. S. Code*, Sec. 1304, subd. 1; *Robinson on Admiralty*, pp. 512-513).

It would indeed be anomalous that a disappearing and disapproved condition on statutory immunity should now for the first time be extended to contractual exemptions.

Petitioners, in the several stages of presenting their contention, have gradually modified it so that it now appears to assume this form: That in order to rely on the contract a carrier must prove seaworthiness in all respects, and, if it cannot, it must prove that the existing elements of unseaworthiness did not cause the loss. So stated, the contention has no support even in analogy to cases arising under Section 3 of the *Harter Act*. The reason advanced for the suggested rule is that it cannot be determined that unseaworthiness did not cause the loss unless the carrier proves that there was no unseaworthiness or shows in what respects, if any, the vessel was unseaworthy.

But when the carrier proves a clear cause as here, i.e., the labor disturbances, logic does not require it to negative the existence of a host of other things which a fertile imagination might conjure. The strike and labor disturbances here were proved and found to be the sole cause of the damage. The issue here was not seaworthiness but cause of the loss, and the ordinary standard of proof prevails, i.e., evidence sufficient to satisfy the reasonable mind is enough. The evidence here was not merely sufficient—it was devastatingly complete. An argument similar to that of petitioners was rejected by the Exchequer Court of Canada in the *John A. McDougald*, 1939 A. M. C. 541 at 551.

Moreover, the ship was in fact proved seaworthy. The record is repetitious that the ship was ready to sail and

would have sailed had the crew not left it (e.g., R. 151, Resp. Ex. M; R. 222, Resp. Ex. S; R. 219, Resp. Ex. R). There is nothing in the record to raise even a doubt on the subject. Respondent's witnesses were not even cross-examined for the purpose of finding doubts. To suggest now that the "Maui" was not proved seaworthy, even were proof of seaworthiness necessary, is sophistry.

The petition (at pp. 22-24) seeks to find a reason for the rule which petitioners advance. They say that there is an implied warranty of seaworthiness which by contract may be reduced to the exercise of due diligence, but that under Section 2 of the *Harter Act* the duty to exercise due diligence to make the ship seaworthy cannot be avoided. We quite agree, but negligence not related causally to a loss is immaterial (*The Malcolm Baxter,* supra), and the duty of care is not avoided by not inquiring into irrelevancies. Petitioners say that the carrier knows the facts connected with the loss and ought to explain them. That is exactly what the carrier here did. The respondent established beyond quibble the cause of the loss. It did not rest with showing that the damage was caused by decay or with showing that the decay was due to delay, but it showed the cause of the delay. It proved not only the immediate cause of the loss, but also the proximate cause.

The bill of lading clauses invoked in this case do not violate Sections 1 or 2 of the *Harter Act,* for they leave the carrier liable for losses due to acts of negligence or failure to exercise due diligence.

If the "reasons" suggested by petitioners had merit, it would be strange that they were ignored in the adoption

of the Hague Rules and the *Carriage of Goods by Sea Act*. Yet under that Act the carrier not only need not prove seaworthiness in respects not causally related to the loss, but he need not prove due diligence to make the ship seaworthy unless he claims statutory immunity from loss due to unseaworthiness. His statutory immunity from other causes of damage is not even conditioned on diligence to make the ship seaworthy (*Robinson on Admiralty*, p. 513; *Carriage of Goods by Sea Act*, 46 *U. S. Code*, Sec. 1304(2)). Among these other exempted causes of damage are strikes and labor troubles (46 *U. S. Code*, Sec. 1304(2) (j)). Certainly a contractual exemption against loss caused by strikes gives no less protection than the *Carriage of Goods by Sea Act*.

II. REPLY TO PETITIONERS' POINT B

Summary

Where a contractual exemption does not violate Sections 1 and 2 of the Harter Act, i. e., does not seek to excuse the carrier from negligence, it is valid. The carrier is entitled to the protection of such contract without establishing the conditions whereunder it would be entitled to the statutory immunities of Section 3 of the Harter Act from a similar loss.

Discussion

Petitioners argue that when Section 3 of the *Harter Act* extends statutory immunities to a carrier under given conditions, the carrier is not entitled to contractual exemption from liability for the same type of loss except under the conditions under which the statutory immunity is conferred. By this argument petitioners revert to the

more extreme form of the contention made by them under their Point A, namely, that a carrier cannot have the protection of the contract unless he first establishes that the ship was seaworthy in all respects, including such as have no causal relation to the loss.

This contention is supported by neither reason nor authority. It was not raised by the petitioners in any one of their 45 assignments of error from the District Court to the Circuit Court of Appeals (R. 450-461), and was first made in a cursory manner (½ page) in their reply brief before the latter Court.

Petitioners cite three cases: *The Wildcroft,* 201 U. S. 378; *May v. Hamburg-American Line,* 290 U. S. 333, and *Martin v. The Southwark,* 191 U. S. 1.

Neither *The Wildcroft* nor *May v. Hamburg-American Line* involved a contractual exemption; each was solely a case where immunity was sought under Section 3 of the *Harter Act.* They did not hold (as petitioners state) that a carrier cannot exempt itself from liability for a cause of damage such as is specified in Section 3 unless it proves the existence of the conditions under which Section 3 would itself grant immunity. They merely held that a carrier cannot have the statutory exemption of Section 3 without complying with the conditions of Section 3. We have already noted that *Martin v. The Southwark* merely held that before obtaining the protection of Section 3, the carrier must comply with the conditions of Section 3, and that before obtaining the protection of a contractual clause, the clause must comply with Section 2.

The *Harter Act* is read in the light of its purpose, and it had a twofold purpose: (1) to grant immunities from

certain risks in the absence of and without necessity of contract; and (2) to confine the extent to which liability might be limited by contract (*The Willdomino*, 300 Fed. 5, 9, 10 (C. C. A. 3), aff'd. 272 U. S. 718; *The Germanic*, 124 Fed. 113 (C. C. A. 2), aff'd. 196 U. S. 589; *Koppers Connecticut Coke Co. v. James McWilliams Blue Line, Inc.*, 89 Fed. (2d) 865, 866 (C. C. A. 2), cert. den., 302 U. S. 706).

The first purpose was accomplished by Section 3; the second by Sections 1 and 2. The limitations placed on contractual exemptions by Sections 1 and 2 are, briefly, that the carrier may not contract against liability for its own negligence. If a contractual clause does not violate Sections 1 or 2, it is valid and effective. By Section 3 statutory immunity was granted even in case of certain types of negligence. Section 3 does not confine contractual clauses at all. It is a grant of immunity, not a prohibition; the grant is conditional, but the conditions of Section 3 are a limitation of the statutory grant of immunity of that section, not a prohibition of contractual exemptions.

The baselessness of petitioners' contention is even more apparent when reduced from the general to the specific. The petitioners say that the loss here was due to the inherent nature of the goods; and that because Section 3 of the *Harter Act* grants immunity, *inter alia*, from damage "due to inherent defect, quality or vice of the things carried", a contractual exemption from liability for loss due to inherent nature of goods is inoperative, even though carrier was guilty of no negligence, unless the carrier prove that the ship was seaworthy in all respects, however unrelated to the damage. The contention means, simply, that a bill of lading clause relative to inherent

nature of goods is not necessary because it can do no more than the statute would do in its absence.

We have noted that the *Harter Act* was enacted not for the purpose of increasing the carrier's common law liability, but to limit common law liability and to define the extent to which it could be limited by contract. At common law, in the absence of contract, the carrier was an insurer with respect to goods, but to this rule there were certain exceptions. One of the exceptions was that the carrier was not liable for loss due to inherent nature, vice or condition of the goods carried (*Clark, et al. v. Barnwell, et al.*, 12 How. (53 U. S.) 272 at 282; *The Willdomino*, 300 Fed. 5, 9 (C. C. A. 3d)). If petitioners' contention were correct, the effect of the *Harter Act* would be to create and increase liability over the common law basis. The contention is patently absurd.

As a matter of fact, the nature of the goods was not the cause of the loss but a condition or quality upon which the proximate cause—the delay caused by the strikes—operated. (Cf. *Schnell v. The Vallescura*, 293 U. S. 296, 305; 79 L. Ed. 373). For this reason respondent defended upon the contract.

III. REPLY TO PETITIONERS' POINT C

Summary

No question of navigating a vessel without a full crew, contrary to the provisions of any statute, arises in this case.

Discussion

Petitioners contend that the "Maui", in going the few hundred yards from the dock to explosives loading anchorage, navigated in violation of a statute (46 *U. S. Code*, Sec. 222). This is a false issue. The statute was first cited and the contention first advanced by the petitioners in a petition for rehearing filed with the Circuit Court of Appeals after that court had rendered its decision. It does not appear in any of petitioners' 45 assignments of error from the District Court to the Circuit Court of Appeals (R. 450-461).

No such question exists in the case. No such question is discussed in the opinion of the Circuit Court of Appeals, and the existence of such a question is not even adumbrated by the facts stated in that opinion.

The statute has no application to this case for several reasons. It pertains to navigation of a vessel with a lesser complement of men than *required* by the local federal inspectors. But there is no evidence whatever that the "Maui" did not have aboard as many men as *required* by the local inspectors. The evidence merely shows how many men the vessel normally carried on its transpacific voyages, but there is no evidence of the number of men *required* by the inspectors either for the transpacific voyage, or, more in point, for port movements in the port of San Francisco. Petitioners' assertion that the vessel

lacked the *required* complement is a pure assumption that the usual complement on the voyages to Hawaii was the minimum required by the inspectors. Such an assumption is without evidentiary support, contrary to the presumption of innocence of crime, and unwarranted in view of the fact that many ships ordinarily carry a greater crew than the legal minimum and that the inspectors often permit operations in safe waters with less crew than on the high seas.

Moreover, the evidence shows that when the vessel started to move the short distance from the dock to the explosives anchorage, it had on board and at the posts of duty as many men as it ever does. It had a full set of officers, a full engine crew, a full steward's department and, in addition, several relief officers from shore to do unlicensed deck work for the short movement (R. 344). Although its usual unlicensed deck personnel for transpacific voyages was 12, only four would have been used for duty in any event, since the law requires division of crew into three watches. The place of these four was in fact taken by the relief men as well as the assistance of the regular officers who were willing to do sailors' work.

The statute, moreover, presupposes a voyage, while here, as both courts below have found, the "Maui" never commenced any voyage. It was not traversing harbor waters on its way to sea, on a voyage already started, as was the situation in *Smith v. Northwestern etc. Co.*, 159 N. E. 87, cited in the petition. The movement from dock to explosives loading anchorage was merely a movement from one loading berth to another loading berth in the same harbor, not in the course of a voyage but prepara-

tory thereto. As noted in *American-West African Line v. Socony Vacuum Corporation*, 4 F. Supp. 515, 519, following *Gilchrist Transportation Company v. Boston Insurance Company*, 223 Fed. 716 (C. C. A. 6):

> "The movement of the West Kebar from one berth to another in the same harbor did not constitute the commencement of the voyage. There is a distinction between the preparation for a voyage and the management of the same after it is begun."

To suggest, as petitioners do, that a ship may not move from one loading berth to another while loading and before prepared to commence its voyage, unless it has on board its usual transoceanic complement, is baseless to the point of absurdity. No vessel could ever leave its dock or hope to get to sea, for, as long as a vessel lies at its dock and loads, the crew leaks away and cannot be held. For this reason, both courts below found that moving from dock to anchorage was an act of care and diligence reasonably and soundly designed to facilitate the completion of the crew.

If the movement of the few hundred yards from dock to explosives loading anchorage could be considered a "voyage" for the purposes of the statute, nevertheless the statute provides that if the vessel is deprived of the services of any number of the crew without its consent or fault,

> "the vessel may proceed on her voyage, if in the judgment of the master, she is sufficiently manned for such voyage."

Here the men who left the vessel did so without consent or fault of the ship. With the remaining crew it was suf-

ficiently manned for the port movement in point of actual fact as well as in the judgment of the master. The petition states (p. 35) that the master made it clear that he considered the vessel inadequately manned. This assertion is contrary to the fact. The master testified that it was entirely safe to cast off the lines to go to anchorage but that it thereafter became unsafe to try to return to the dock because conditions had radically altered in the interim. For example, the engine crew deserted when it was too late to stop the ship, and the licensed officers were threatened by longshoremen and therefore declined to do anything but the proper work of their positions. (e. g., R. 245, 248, 250, 333)

There being, then no violation of any statute, petitioners' contention deserves no further attention.

CONCLUSION

We respectfully submit that a writ of certiorari should not be granted.

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(APPENDIX FOLLOWS)